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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 10, 1944
CERTIORARI GRANTED DECEMBER 4, 1944

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals
For the Second Circuit

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement Under Rule 13

The above entitled proceeding was commenced by the filing of a petition in the office of the Clerk of the former United States Board of Tax Appeals on April 15, 1942. The names of the parties are given in full above, and there has been no change or substitution of parties.

The dates of service of the respective pleadings were as follows:

Petition filed April 15, 1942, served April 16, 1942.

Amended petition filed June 13, 1942, served June 17, 1942.

Answer to petition filed June 15, 1942, served June 15, 1942.

Answer to amended petition filed June 29, 1942, served June 30, 1942.

Amendment to answer to amended petition filed September 19, 1942, served September 19, 1942.

Reply to amended answer filed October 19, 1942, served October 19, 1942.

Amendment to amended petition filed February 23, 1943, served February 23, 1943.

2 There has been no arrest, bail or attachment of property in this proceeding. The proceeding was tried at New York, N. Y., on February 23, 1942, before Honorable J. Russel Leech, Judge of the Tax Court.

There has been no reference to any Commissioner or Special Master.

The decision of the Tax Court was entered June 23, 1943.

The petition for review by this Court was filed August 14, 1943.

In the Tax Court of the United States

Docket No. 110585

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

Filed at hearing, New York, Feb. 23, 1943

It is hereby stipulated for the purposes of this proceeding that the following facts are true and that this stipulation may be received as conclusive evidence thereof:

1. Petitioner, Barnett Hollander, was duly appointed by the Surrogate's Court of New York County, New York,
3 executor of the Last Will and Testament of Lester Field, deceased, who died domiciled in the said County and State of New York, and that Letters Testamentary were duly issued to him as such executor by said Court on April 14th, 1941.

2. Abraham Kraditor who was appointed Temporary Administrator of the Estate of Lester Field, deceased, resigned as such Temporary Administrator and his Letters of Temporary Administration were duly revoked by order of the Surrogate's Court of New York County entered November 14th, 1940.

3. The respondent heretofore, by a notice of deficiency dated June 11, 1940, from which no appeal to this Court was taken, determined the net estate to be $236,963.28 under the Revenue Act of 1926 and $296,963.28 under the Revenue Act of 1932 as amended, which resulted in a tax liability under the Revenue Act of 1926 of $5,978.53 and a tax liability under the Revenue Act of 1932 as amended of $40,614.13; a net tax of $14,638.89 was assessed and paid on April 18, 1939, on the basis of the return filed resulting in a net deficiency of $26,570.95 which was assessed and paid on December 23, 1940. In determining the net deficiency of $26,570.95, the respondent allowed tentatively a credit for State estate taxes of $4,782.82. Evidence of the payment of taxes to the State not having been submitted, the respondent sent the notice of deficiency in the amount of $4,782.82, dated January 16, 1942, from which this appeal is taken. On the return filed by petitioner, there was included in the gross estate $150,000 on account of the trust referred to in paragraph 5 and Exhibit 1 hereof. Upon audit, the full amount of the property of this trust of the value of $307,452.82 as at the date of decedent's death was in-

cluded in the gross estate by respondent in the notice of
4 deficiency dated June 11, 1940. No claim for refund has been filed with the respondent with respect to the tax involved in this proceeding.

4. Petitioner has paid to the State of New York State estate taxes in the amount of $6,814.07 and is entitled to credit for such State estate taxes in the amount allowed by law but not exceeding said amount of $6,814.07.

5. On June 8, 1922, decedent transferred to Bankers Trust Company as trustee certain assets valued at the date of decedent's death at the sum of $307,452.82. Said assets were so transferred to be held by said Bankers Trust Company as trustee pursuant to the terms of an Indenture bearing date June 8, 1922, a copy of which is attached hereto and marked Exhibit 1.

6. A copy of the Last Will and Testament of said Lester Field, deceased, as admitted to probate by the Surrogate's Court of the County of New York is attached hereto and marked Exhibit 2 hereof.

7. Said deceased at the time of the making of said Indenture bearing date June 8, 1922, was known as Lester Rosenfield. His name was thereafter changed to Lester Field by an order of the Supreme Court of the State of New York entered in New York County.

8. Said deceased, Lester Field, never had any issue, and at the time of his death said deceased was survived by his widow, Blanche Field, his sister Ruth R. Hollander, the issue of his deceased brother Hugo Rosenfield, being two sons of said Hugo Rosenfield named John R. Field and Warren R. Field, respectively, and by Noel Ruth Hollander and Audrey Hollander Israel, referred to in said Indenture of Trust as Audrey Louise Hollander.

5 9. At the time of the death of deceased, he was a citizen of the United States, of the age of 52 years; said Noel Ruth Hollander was of the age of eighteen years; and said Audrey Hollander Israel was of the age of 25 years.

10. Said transfer in trust was not made by decedent in contemplation of death. Decedent did not at any time relinquish any power to alter, amend or revoke said transfer or to change the enjoyment of the property transferred, in contemplation of death.

11. In determining the net estate of decedent herein there was omitted from inclusion in the gross estate the amount of $3,338.36, being the difference between the correct amount and the amount included in the gross estate in the notice of deficiency from which this appeal is taken, on account of income accrued to the date of death on the trust created by the decedent on June 8, 1922 in

possession of Bankers Trust Company, and that said sum of $3,338.36 is properly includible in the gross estate of decedent.

12. The value of a remainder in the sum of $157,452.82 payable upon the death of the survivor of two females aged eighteen and twenty-five years respectively was at the time of decedent's death $24,930.76.

13. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82 payable upon the death of the survivor of two females aged eighteen and twenty-five years respectively, contingent upon his survival of both of said females, was $891.18.

EDGAR J. BERNHEIMER,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

6 *Exhibit 1, annexed to foregoing statement of facts*

This indenture of trust made, executed and entered into this 8th day of June in the year one thousand nine hundred and twenty-two, by and between Lester Rosenfield, of the Borough of Manhattan, City of New York, now residing in Paris, France, hereinafter described as the "Donor," and the Bankers Trust Company, a New York corporation, with its principal place of business at No. 16 Wall Street, in said Borough and City, hereinafter described as the "Trustee,"

Witnesseth: Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, that in consideration of the premises, the mutual covenants herein contained and of other good and valuable considerations, the Donor does hereby transfer, assign, set over and entrust unto the said Trustee, its successors and assigns certain shares, securities and valuables, of which a list is hereto attached and designated Schedule A, the receipt whereof by said Trustee is hereby acknowledged, for the following uses and purposes and upon the following trust, conditions and reservations:

First: (A) During the lifetime of Audrey Louise Hollander and Noel Ruth Hollander, the daughters of Ruth Rosenfield Hollander, or their survivor, the said Trustee shall have, hold and retain the said shares, securities and valuables and any other securities, money or property that may be substituted therefor, or added thereto, or that may result from reinvestment hereunder, and shall, if convenient and desirable in its discretion, procure

7 such shares and securities to be transferred to, or regis-

tered in, its name, or in the name of its nominee, and shall collect the interests, incomes and dividends and pay over, distribute, and dispose of the same, whether interest or corpus, as follows:

(B) During the lifetime of the Donor, but not in any event after the deaths of Audrey Louise Hollander and Noel Ruth Hollander, all of said incomes, interests and dividends shall be paid over and delivered to the Donor himself in periodic payments absolutely, with the reservation and proviso, however, that all payments of whatsoever kind that may be made to or for the benefit of the Donor, or to or for the benefit of any person whatsoever named or referred to herein or hereunder, or out of or in connection with the trust and corpus herein established (but not intending to include payments to the Trustee or for the purchase of securities for capital account or for expenses), shall, during the lifetime of Isaac Rosenfield, the father of the Donor, be paid to said Isaac Rosenfield as the agent, attorney and representative of said Donor, and of such persons to whom said monies may be payable hereunder, such agency and representation being hereby declared, and shall be construed to be coupled with an interest and irrevocable excepting only if and to the extent that the same may in any case and in any amount be disaffirmed, relinquished, surrendered, delegated or substituted by the said Isaac Rosenfield; and until and unless so disaffirmed, relinquished, surrendered, delegated or substituted, the receipt of said Isaac Rosenfield during his lifetime for any and all payments either of principal or income made by the Trustee to the Donor, or any of the beneficiaries or otherwise hereunder, shall be full and complete protection and release to the Trustee,
8 and the Trustee shall in no event whatsoever have any responsibility or any duty to inquire into or see to the application or disposition of any payments or property so paid and delivered. The right of the said Isaac Rosenfield to delegate or substitute his agency and powers hereunder shall not, however, extend beyond the lifetime of the said Isaac Rosenfield.

(C) Upon the death of the Donor during the lifetime of said Audrey Louise Hollander and Noel Ruth Hollander, or their survivor, leaving him surviving any lawful issue or any widow to whom the Donor may bear the marriage relation at the time of his decease, then all of the said corpus of the trust fund hereby established, subject only to the right hereby reserved to the Donor as hereinafter more fully appears to reduce or cancel said amounts, shall be divided into separate trust funds, one of $150,000 for such surviving widow, if any, and the remainder, or the whole thereof if there should be no such surviving widow, into equal trust funds among the then surviving lawful children of the Donor or among

the then surviving lawful issue of any deceased child per stirpes and not per capita.

(D) In the event, however, that the Donor shall by his last will and testament, or any instrument duly signed, acknowledged and lodged with the Trustee, so appoint, declare and direct, then the amount that shall constitute the corpus of any trust fund shall be reduced or may be wholly abrogated and cancelled, whereupon the amounts to be divided into trust funds hereunder for the remaining lawful issue, provision for whom shall not be so reduced or abrogated by the Donor, shall be to that extent increased,
9 but in no event shall the fund set apart for any such surviving widow exceed the sum of $150,000, nor shall any amount or fund so reduced or abrogated by the Donor be increased or restored.

(E) In the event, however, that the Donor should by his last will and testament, or the instrument immediately above set forth, wholly abrogate all trusts and funds and all provisions as herein set forth for any such widow and issue, or in the event that he should by such last will or instrument so reduce the provision herein for such widow or issue that there should remain a balance of said corpus and fund undisposed of hereunder, then said entire corpus, or any such undisposed of balance, shall be paid over equally absolutely to the then surviving brother and sister of the Donor, or their then surviving lawful issue, per stirpes and not per capita.

(F) As to each such trust fund established hereunder the Trustee shall during the lifetime of Audrey Louise Hollander and Noel Ruth Hollander and their survivor have, hold and retain the shares, securities and valuables constituting the same and receive and collect the incomes, interests and dividends therefrom and pay the same over in periodic payments to each said surviving beneficiary from whom said trust and fund shall have been established or appointed, and upon the death of any such issue of the Donor or whom any such trust shall have been established or appointed, the corpus and principal of said fund so set apart for such deceased issue shall be divided and paid over equally absolutely per stirpes to and among the then surviving lawful issue of such life tenant for whom said trust shall have been established or appointed, or failing such issue then surviving to and among the then
10 surviving lawful issue of the Donor, equally absolutely per stirpes and not per capita, or if there should then be no such issue then surviving, then equally absolutely to and between the then surviving brother and sister of the Donor or their lawful issue per stirpes and not per capita.

(G) Upon the death of any such surviving widow for whom any such trust fund shall have been appointed, then the principal and

corpus of the fund so set apart for such widow shall be distributed equally absolutely among the then surviving lawful issue of the Donor per stirpes and not per capita, and in the event of the failure of any such issue then surviving, in such event, the corpus of said trust fund so set apart for the surviving widow shall be paid and divided equally absolutely to and between the surviving brother and sister of the Donor or their lawful issue then surviving per stirpes and not per capita.

(H) Upon the death of the said Audrey Louise Hollander and Noel Ruth Hollander, and their survivor, before the Donor, then the principal and corpus of said entire trust fund shall be and become the property of and shall be paid to the said Donor absolutely.

(I) Upon the death of said Audrey Louise Hollander and Noel Ruth Hollander, and their survivor, after the lifetime of the Donor but during the existence of any trust created hereunder by said Donor, or pursuant hereto, then the principal and corpus of each and any said trust so created and so existing shall be and become the property of and shall be at once paid over to the life beneficiary of each said trust absolutely.

Second: The incomes of any trusts established hereunder,
11 or pursuant hereto, if payable to a minor or otherwise, shall be paid periodically or currently as they accrue and shall not be accumulated, always subject to the rights and powers of said Isaac Rosenfield hereunder.

Third: It is the agreement and intention hereof that under no conditions or circumstances shall the Trustee acquire absolute beneficial ownership of any of the corpus, incomes, issues or choses in action hereunder or in connection herewith, but that this instrument and the provisions hereof shall be and be construed to be entirely for the benefit and protection of the Donor and the objects of his bounty and solicitude as herein set forth. In the event that at any time, whether under any of the provisions hereof or by act or operation of law or otherwise, it should be deemed or construed that there should vest in the said Trustee any beneficial ownership or enjoyment whatsoever of said corpus, principal, interest, dividends, incomes or issues, or any part thereof, then said fund or monies whether principal or incomes shall be paid over absolutely to the Donor, and in the event that he shall not then survive, then to such persons in such amounts as they would be entitled thereto in the event of the death intestate of the Donor possessed of the absolute title thereto under the laws existing in the State of New York at the date of the execution hereof.

Fourth: During the lifetime of Isaac Rosenfield above named, but not beyond the lifetime of the said Audrey Louise Hollander and Noel Ruth Hollander, the said Isaac Rosenfield shall have the

sole right and power to invest or direct the investment of any and all funds and assets forming the principal and corpus of said trust estate and any trust hereunder, and to change or direct
12 the change of the investment thereof, and to sell, exchange, or otherwise dispose of any present or future securities or valuables or any part thereof, and to substitute the proceeds thereof or direct such substitution, or to purchase or otherwise substitute for such securities and assets as are disposed of, securities, money or assets, including notes, whether secured or unsecured, procured with said proceeds, or to direct the same with absolute discretion to said Isaac Rosenfield as to the nature of said investments and reinvestments and without regard to whether the existing or any substituted investments are such as are legal for the investment of trust funds for trustees. The Trustee shall not be liable for any loss from any sale, investment or reinvestment made at the direction of the said Isaac Rosenfield, and is hereby released from any and all liability and responsibility by reason of any such sale, investment or reinvestment so made at the request of the said Isaac Rosenfield or by reason of any loss, depreciation or matter arising by reason thereof. After the death of the said Isaac Rosenfield the Trustee shall be authorized to retain, without any liability for so doing, any assets then constituting the principal of the trust fund, and to sell, invest and reinvest the same without being limited to the securities in which trustees are authorized to invest trust funds.

Fifth: All rights or privileges issued or accruing in connection with any securities held in said corpus or fund, including rights or privileges to subscribe for other or additional stock or securities, shall be sold and disposed of and the proceeds thereof, if legal and not in contravention of any law against undue accumulation, shall be regarded as and added to the principal or corpus of
13 said fund. In the event, however, that the said rights or privileges shall be to purchase, acquire or invest in any securities and should not be sold, then said rights and privileges may be availed of and purchases made thereunder at the direction of the said Isaac Rosenfield and after his death in the discretion of the Trustee if funds are available for such purpose. At the direction of the said Isaac Rosenfield and after his death in the discretion of the Trustee, and so far as concerns securities in its hands in this trust, the Trustee may enter into plans of reorganization, deposit securities in connection therewith, and pay levies out of the principal of this trust, and may, at the direction of said Isaac Rosenfield, and after his death at the discretion of the Trustee, mortgage, lease, release, improve, alter, exchange and convey any real estate that may at any time form the corpus of any trust hereunder and may for such purposes use the principal of said

corpus so far as necessary, but the said Trustee shall not exchange securities for real estate, nor invest funds of any said trust in real estate, but may acquire real estate in foreclosure of any mortgage that may form a part of any trust hereunder.

All disbursements of principal or capital that may be made upon or by virtue of any securities held by the Trustee hereunder, as well as any and all stock dividends or distributions of scrip or securities of whatever kind in addition to the usual dividend disbursements, shall, if legal and not in contravention of any law against undue accumulation, be considered and treated as capital and added to the corpus of the funds so held by the Trustee hereunder and shall not be disbursed as income to the beneficiaries.

Sixth: Upon the termination of any trust hereunder the
14 principal or any part thereof to be turned over and distributed may be so paid by the Trustee in kind and without sale of the securities forming the corpus thereof, and the properly exercised discretion of the Trustee as to the value of the securities so paid over and transferred shall be sufficient and conclusive.

Seventh: It is expressly agreed that there is no obligation upon the Trustee or any person to set up or maintain any sinking fund or other fund as against possible depreciation of the corpus of this estate or securities therein or to amortize the same whether purchased at a premium or otherwise.

Eighth: The said Donor shall have the right to direct in writing at any time the transfer of any of the corpus, principal or securities herein to any branch of the Trustee, irrespective of whether such branch is in the State of New York or in any foreign state or country, but at the expense either of the principal or income as the Trustee may deem proper.

Ninth: Said Donor shall have the right to add any funds, valuables, securities, property, real or personal, or choses in action to, or otherwise to increase said corpus or principal of, this trust or any trust or fund hereunder at any time, and any such additions as well as any monies, securities or things substituted for or purchased from or being the proceeds of the corpus of this trust shall at once become subject to all the terms and conditions hereof. The said Trustee is, however, hereby released from any and all responsibility or liability by reason of the retention by it of any assets at any time turned over to it by the Donor and by reason of any depreciation or other loss which may occur in connection therewith.

15 Tenth: Nothing herein contained shall limit or take away from the absolute right of the Trustee to enter into any reorganizations, mergers or consolidations, or into agreements looking to such purposes, excepting in so far as exclusive powers

of investment or direction may be given to the said Isaac Rosenfield hereunder.

Eleventh: The Trustee shall have the right further to resign this trust and to be relieved from all obligations hereunder upon thirty days' written notice to the Donor, or upon his death to the living beneficiaries hereunder.

Twelfth: The compensation of the Trustee shall be one percent (1%) upon the incomes received and disbursed by it annually. Upon and at the time of the paying over of the principal or corpus of any fund hereunder, however, the Trustee shall be entitled to receive the commissions allowed by law to trustees in the State of New York upon such principal. The Trustee shall not, however, be entitled to extra commissions or commissions upon principal upon the setting up of any additional trusts or the division into smaller trusts hereunder. Expenses necessarily and reasonably incurred by the Trustee in connection with the trust shall be reimbursed to it and may be chargeable first only against the income and then against the corpus, but not against the Donor or any beneficiary personally. The Trustee shall, however, advise the Donor by letter prior to its incurring expenses greater in amount than Five Hundred Dollars ($500).

Thirteenth: No beneficiary hereunder shall have the right to anticipate, mortgage, pledge, hypothecate, encumber or assign any interest hereunder, whether of income, corpus or remainder. In the event of the bringing of any judgment-creditors' action or proceeding, or any action or proceeding of like character, for the purpose of reaching the interest of any beneficiary hereunder, whether in income, corpus or remainder, and/or of sequestering it and/or preventing the absolute paying over and actual use and enjoyment thereof, unimpaired, by such beneficiary, and/or of diverting it from the purposes and objects contemplated by the Donor as herein set forth, and in the event that any order, decree, judgment or relief be obtained or issued by any court against any beneficiary to that effect, then from that event or from the date of the issuance of such order, decree, judgment or relief, all income, and any right, title and interest of said beneficiary hereunder shall at once cease and the Trustee shall thereupon convey and pay over any such incomes or remainder and all such right, title and interest and shall thereupon dispose of and treat any corpus to which such beneficiary was theretofore entitled or in which such beneficiary had any interest as though such beneficiary were dead.

Fourteenth: If it be held that any of the provisions of this instrument are illegal or contrary to law, then the remaining legal provisions shall be enforced and given effect as though the parts so held to be illegal were not contained herein or were an imma-

terial part hereof, providing, however, that the cancellation or non-enforcement of any such illegal provisions does not materially change or destroy the scope, effect and intention of this instrument. For the purposes of construing this instrument, the words "beneficiaries," "children" or "issue" shall in no case include or be held to mean or refer to any adopted child, and no adopted child shall be entitled to or take any benefit hereunder.

17 Fifteenth: All income accrued on any securities at the time of delivery to the Trustee hereunder by the Donor shall be treated as income and not as principal.

In witness whereof the Donor has hereunto set his hand and seal and the Trustee has hereunto affixed its corporate seal and caused this instrument to be executed by its duly authorized officer the day and year first above written.

[L. S.]

LESTER ROSENFIELD,
By ISAAC ROSENFIELD,
Atty. in fact.

In the presence of:
BARNETT L. HOLLANDER.

[SEAL]

BANKERS TRUST COMPANY,
HENRY J. COCHRAN,
Vice President.

Attest:
C. C. PRICE,
Asst. Trust Officer.

18 STATE OF NEW YORK,
County of New York, ss:

On the 8th day of June, nineteen hundred and twenty-two, beforeme came Isaac Rosenfield, to me known to be the attorney in fact of Lester Rosenfield, the individual described in and who by his said attorney in fact executed the foregoing instrument, and duly acknowledged before me that he executed the same as the act and deed of Lester Rosenfield, therein described, and for the purposes therein mentioned, by virtue of a power of attorney duly executed by the said Lester Rosenfield.

[NOTARY SEAL]

L. VAN NEST,
Notary Public, Bronx County.

Clerk's No. 2. Register's No. 6. New York Co. Clerk's No. 31, Register's No. 3037. Commission expires March 30, 1928.

STATE OF NEW YORK,
County of New York, ss:

On this 8th day of June, 1922, before me personally came H. J. Cochran, to me known, who, being by me duly sworn, did depose

and say that he resides in Plainfield, New Jersey; that he is Vice President of the Bankers Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[NOTARY SEAL] L. VAN NEST,
Notary Public, Bronx County.

Clerk's No. 2. Register's No. 6. New York Co. Clerk's No. 31. Register's No. 3037. Commission expires March 30, 1928.

RE-EXECUTION.

19 In witness whereof the Donor has hereunto set his hand and seal and the Trustee has hereunto affixed its corporate seal and caused this instrument to be executed by its duly authorized officer the day and year first above written.

[L. S.] LESTER ROSENFIELD.

In the presence of:
J. F. FREENEY.

UNITED STATES CONSULATE GENERAL,
City of Paris, Republic of France, ss:

On this 19th day of June 1922 before me personally came Lester Rosenfield to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

JOHN F. FREENEY,
Vice-Consul of the United States of America at Paris, France.
6883

American Consulate General Seal, Paris, France.
American Consular Service, $2.00 Fee Stamp, Cancelled.
American Consulate General, June 19, 1922, Paris, France.

20 *Exhibit 2, annexed to foregoing statement of facts*

I, Lester Field, a citizen of the United States, having my domicile in the City of New York, and residing in the City of Paris, Republic of France, being of sound mind and disposing memory, mindful of the uncertainty of human life, and being desirous of disposing of all of my property of whatsoever nature and whereso-

ever situate, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all last wills and Testaments and codicils thereto heretofore by me made.

First: I direct the payment of all my just debts and funeral expenses as soon after my death as practicable.

Second: I give and bequeath all my personal apparel, jewelry, furniture, household furnishings, paintings and motor cars to my beloved wife, Blanche Field, outright, absolutely and forever.

Third: I direct that, in accordance with the provisions of a deed of trust dated the eighth day of June, nineteen hundred and twenty-two, entered into between the Testator herein and the Bankers Trust Company of New York City, there be set aside the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, to be held in trust, the entire income therefrom to be paid to my wife during her life.

Fourth: I direct that all the rest, residue and remainder of my estate of whatsoever kind and nature, and wheresoever situate, whether real, personal or mixed property, whereof I may die seized or possessed or to which I may be in any manner entitled, or as to which or in respect of which I may have any power of appointment, be disposed of as follows:

21 A. I direct that my executors convert my property into cash or marketable securities of any kind or nature whatsoever as soon as practicable after my decease and that the said monies and securities comprising said residue of my estate be deposited with the Bankers Trust Company of New York City to constitute two trust funds, designated and described as follows:

I. The first trust, hereinafter called the Lagarde Trust, for the benefit of my dear friend, Juilliet Lagarde, a resident of the City of Paris, with the following terms and conditions:

(a) The Trust fund shall consist of the sum of Forty Thousand ($40,000.00) Dollars, in cash or securities.

(b) The Trustee of said Trust fund shall be the Bankers Trust Company of the City of New York.

(c) The Trustee shall have full discretion as to the kinds and types of investments to make and as to when the securities held in the trust shall be sold or retired, limited however, to statutes governing administration of trust property.

(d) The Trustee shall hold the securities and other property under its control during the lifetime of Juilliet Lagarde.

(e) The Trustee shall pay to the said Juilliet Lagarde the entire income of the Trust during her lifetime.

(f) Upon the death of the said Juilliet Lagarde, the Trustee shall pay over the entire property comprising the said Trust fund

to the trustee of the Blanche Rosenfield Trust, and the
22 property so paid over shall become merged with the property then in the Blanche Rosenfield Trust and be there kept and administered under the same terms and conditions governing the administration of the original Blanche Rosenfield Trust.

(g) Should my wife pre-decease the said Juilliet Lagarde then upon the death of the said Juilliet Lagarde, I direct that the Trustees shall pay over the entire property comprising the said Lagarde Trust to my natural heirs as designated in the Trust Document held by Bankers Trust Co.

II. The second trust, hereinafter called the Blanche Rosenfield Trust, to be for the benefit of my beloved wife, Blanche Rosenfield, a resident of the City of Paris, with the following terms and conditions:

(a) The trust shall comprise all the rest, residue and remainder of my estate, in excess of the $40,000.00 set aside for the Lagarde Trust.

(b) The Trustee of said Blanche Rosenfield Trust shall be the Bankers Trust Company of the City of New York.

(c) The Trustee shall have full discretion as to the kinds and types of investments to make and as to when the securities held in the Trust shall be sold or retired, limited however to the statutes governing administration of Trust property.

(d) The Trustee shall hold the securities and other property of the Trust under its control during the lifetime of my wife, Blanche Rosenfield.

(e) The Trustee shall pay to my wife the entire income of the Trust during her lifetime.

23 (f) Upon the death of my wife, the Trustee shall pay over the entire property comprising the said Trust to my natural heirs as designated in the trust document held by Bankers Trust.

Fifth: Provided always that the terms of this Will or any provision herein made for the benefit of my wife, Blanche Rosenfield, shall be effective only if, in the event of my death, we shall still be husband and wife. It is my intention, and I direct, that should our marriage relationship be terminated before my death, any provisions made herein for the benefit of my wife be considered null and void and of no effect, the same as if she had predeceased me.

Sixth: Should I die outside of the United States, it is my desire that the laws of New York State govern the administration of this my Last Will and Testament and any property disposed of hereunder.

Seventh: I hereby nominate and appoint as executors of this my Last Will and Testatment, Abraham Kraditor and Barnett L.

Hollander, or their survivor, or any of them as may qualify, and hereby empower my said executor or executors, as the case may be, to grant, bargain, sell, convey and dispose of any lands or property, real or personal, whereof I may die seized or possessed and to execute and deliver all proper instruments of conveyance therefor, to mortgage, lease or sub-lease any and all of my said estate, and otherwise deal with the same as though it were his or their sole property. My said executor or executors shall not be required to give any bond for the due and faithful performance of
24 his or their duties hereunder. I further direct that my said executors, the survivor or survivors of them, shall not be personally responsible for any loss that the estate may suffer due to the purchase or sale by them of any securities or properties in accordance with the directions of this my Last Will and Testament.

In witness whereof I have hereunto subscribed my name and set my seal at the end hereof, in the City of New York this sixth day of August in the year nineteen hundred and thirty-one.

Revised Sept. 29, 1933.

[L. S.]

LESTER FIELD.

25 In the Tax Court of the United States

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110585. Promulgated June 2, 1943

On June 8, 1922, decedent transferred property in trust, in all of which he retained a possibility of reverter until his death. He died on November 16, 1937. **Held**, the measure of the decedent's estate for estate tax purposes includes the value of the entire trust corpus at his death. Sec. 302 (c), Revenue Act of 1926, as amended by sec. 803 (a), Revenue Act of 1932; Helvering *v.* Hallock, 309 U. S. 106; Smith *v.* Shaughnessy, — U. S. — (Feb. 15, 1943).

Sydney J. Schwartz, Esq., for the petitioner.

J. C. Maddox, Esq., for the respondent.

Opinion

LEECH, Judge: Respondent determined a deficiency of $4,782.82 in estate tax by, inter alia, including in the value of decedent's estate the entire value of the corpus of an inter vivos trust created by the petitioner's decedent in 1922. Petitioner asks a finding of an overpayment of $25,684.23. The propriety of that action of

respondent is the only issue here. The estate tax return was filed with the collector for the second district of New York.

The facts were stipulated and are so found.

Decedent died on November 16, 1937, at the age of 52 years.

On June 8, 1922, he transferred to Bankers Trust Co., as
26 trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by respondent in decedent's estate in computing the present deficiency.

Summarized, the terms of this trust were:

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, infra.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus
27 is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none, then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death decedent was survived by his two nieces, whose lives were to measure the maximum life of the trust, and they were then of the age

of 18 and 25 years, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield.

The transfer in trust was not made in contemplation of death, nor did deceased at any time relinquish any power to alter, amend, or revoke the transfer or to change the enjoyment of the property transferred in contemplation of death.

It is conceded by the petitioner that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the
28 sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18.

Petitioner concedes that the value of the trust remainder, to the amount of the $150,000 allocable by decedent to the trust for the widow, was properly included for estate tax purposes under section 302 (d) of the Revenue Act of 1926, as amended. The issue here therefore is whether respondent was correct when he included the balance of that remainder for those purposes. Respondent supports his action of including the entire value of the remainder upon three grounds: (1) under section 302 (c) of the Revenue Act of 1926, as amended by section 803 (a) of the Revenue Act of 1932, as construed by Helvering v. Hallock, 309 U. S. 106, and other cases; (2) under section 302 (d) of the Revenue Act of 1926, as amended by section 401 of the Revenue Act of 1934; and (3) decedent died owning outright that part of the trust corpus which exceeded the $150,000 allocable therein to the trust for the widow.

In opposing the first above contention, petitioner concedes that decedent, by the trust deed, reserved a possibility or reverter in the trust remainder until his death, in that, if he survived his two nieces whose lives measured the maximum life of the trust, its entire corpus would revert to him. Its position, however, is that only the value of that possibility of reverter, which is here stipulated, can be included in the value of decedent's estate at his death for estate tax purposes. It also cites the Hallock as well as other cases.

Whatever may have been said[1] about the uncertainty of
29 the law on the point thus raised prior to the decision of the Supreme Court in *Smith* v. *Shaughnessy*, — U. S. — (Feb. 15, 1943) (see also *Robinette* v. *Helvering*, — U. S. — (Feb. 15, 1943)), we think the decision in the *Shaughnessy* case definitely concludes the petitioner here.

It is true that case involved only gift tax. The sole controversy, however, there as here was whether the measure of such tax included the value of the remainder of an inter vivos trust created by the donor similar for present purposes to that now before us. The Supreme Court there pointed out that the principal contention of the taxpayer was that the value of such remainder was not includible in the value of the gift for gift tax purposes because it would be later includible in the value of the estate of the donor for estate tax purposes under the Hallock case, supra, and that thus subjecting it to both an estate and gift tax would be contrary to the policy announced by the Supreme Court in Estate of Sanford v. Commissioner, 308 U. S. 39. The Court then proceeded to say:

This view, we think, misunderstands our position in the Sanford case. As we said there, the gift and estate tax laws are closely related and the gift tax serves to supplement the estate tax. We said that the taxes are not "always mutually exclusive," and called attention to § 322 of the 1924 Act there involved (re-enacted with amendments in § 801 of the 1932 Act) which charts the course for granting credits on estate taxes by reason of previous payment of gift taxes on the same property. The scope of that provision we need not now determine. It is sufficient to note here that Congress plainly pointed out that "some" of the "total gifts subject to gift taxes * * * may be included for estate tax purposes and some not." House Report No. 708, 72d Cong., 1st Sess., p. 45.
30 Under the statute the gift tax amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter; it is in no sense double taxation as the taxpayer suggests.

We conclude that under the present statute, Congress has provided as its plan for integrating the estate and gift taxes this system of secured payment on gifts which will later be subject to the estate tax.

Unencumbered by any notion of policy against subjecting this transaction to both estate and gift taxes, we turn to the basic question of whether there was a gift of the remainder. * * *

We think it is inherent in this expression of the Supreme Court that the remainder of such a trust may be not only subject to gift tax, as was there decided, but is also subject to the estate tax con-

[1] Paul, Federal Estate and Gift Taxation, sec. 7.25, ch. 7, vol. I.

tested here. It may be that the amount of a gift tax paid upon an inter vivos transfer which included in its measure the value of the remainder would be credited against a later estate tax. But, under the quoted decision, that tax is the principal—the inclusive tax. It stands up on its own feet and is measured by its own standards, which are not affected by those of the gift tax. Thus because there was no "down-payment on the estate tax," in the form of a gift tax, as here,[2] the estate tax is not reduced in any degree.

The question of whether the measure of the value of the remainder includible here at decedent's death for estate tax purposes should exclude the value of any life estate to his issue is moot, since decedent died without ever having had issue and thus no life estate, following his own, arose. Respondent is therefore affirmed on the submitted issue.

This decision renders unnecessary any consideration of respondent's second and third positions.

Decision will be entered under Rule 50.

31 In The Tax Court of the United States

Docket No. 110585

Respondent's computation for entry of Decision

Filed January 21, 1943

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
E. C. ALGIRE,
Division Counsel.
JAMES C. MADDOX,
Special Attorney,
Bureau of Internal Revenue.

Without prejudice to the right of appeal as provided by
32 law I agree that the attached computation is in accordance

[2] There was no gift tax during 1922 when the transfer in trust was made here.

with the opinion of the Tax Court of the United States in the above-entitled appeal.

EDGAR L. BERNHEIMER,
Counsel for Petitioner.

Audit Statement

C:TS:NYD—Recomp.
JFP:FJG

In re: Estate of Lester Field, Barnett Hollander, Temporary Administrator, c/o Hollander & Bernheimer, 3 South William Street, New York, New York.

Docket: #110585.

Date of death: November 16, 1937.

Liability	*Assessed*	*Deficiency in assessment and payment*
$41,770.67	$41,209.84	$560.83

Recomputation of tax liability prepared in accordance with decision of The Tax Court of the United States promulgated June 2, 1943.

Credit for State taxes under the provisions of Section 301 (b) of the Revenue Act of 1926, as amended by Section 802 (a)
33 of the Revenue Act of 1932, and limited by Section 402 (a) of the latter Act, has been allowed against the gross basic tax liability on the basis of the credit evidence on file.

Adjustment to Net Estate

	For basic tax	*For additional tax*
Net estate shown in deficiency letter dated January 16, 1942	$236,963.28	$296,963.28
Addition:		
(a) Accrued income to the date of death on trust created by the decedent on June 8, 1922	3,338.36	3,338.36
Adjusted net estate	$240,301.64	$300,301.64

34 Explanation of Adjustment

(a) The amount of $3,338.36 representing accrued income to the date of death of a trust created by the decedent on June 8, 1922 is included in the gross estate. (Stipulation of facts, paragraph 11, page 4.)

A credit of $4,889.66 is allowed for State estate taxes. (Stipulation of facts, paragraph 4, page 3.)

Computation of Estate Tax

Net estate for basic tax		$240,301.64
Net estate for additional tax		$300,301.64
Gross basic tax		$ 6,112.07
Credit for estate and inheritance taxes		4,889.66
Net basic tax		$ 1,222.41
Total gross taxes (basic and additional)	$46,660.33	
Gross basic tax	6,112.07	
Net additional tax		40,548.26
Total net basic and additional taxes		$ 41,770.67
Tax assessed:		
Original, April 1939 list, page 104, line 4	$14,638.89	
Additional, Oct. 1940 list, page S 190, line 12	26,570.95	
Total assessed		41,209.84
Deficiency of estate tax		$560.83

35 Statement of Account

C:TS:NYD—Recomp.
JFF:FJG

In re: Estate of Lester Field. Barnett Hollander, Temporary Administrator, c/o Hollander & Bernheimer, 3 South William Street, New York, New York.

Docket: #110585.

Date of death: November 16, 1937.

Estate tax liability		$41,770.67
Estate tax assessed:		
Original, April 1939 list, page 104, line 4	$14,638.89	
Additional, Oct. 1940 list, page S 190, line 2	26,570.95	41,209.84
Deficiency in assessment		$560.83
Estate tax liability		$41,770.67
Estate tax paid:		
April 18, 1939	$14,638.89	
December 23, 1940	26,570.95	41,209.84
Deficiency in payment		$560.83

36 In The Tax Court of the United States

Washington

Docket No. 110585

Decision

Pursuant to the Opinion of the Court promulgated June 2, 1943, the parties hereto having filed on June 21, 1943, an agreed computation, it is, therefore,

Ordered and decided: That there is a deficiency in estate tax in the amount of $560.83.

Enter:

(Signed) J. RUSSELL LEECH,
Judge.

Entered, June 23, 1943.

37 In United States Board of Tax Appeals

Docket No. 110585

**Statement of evidence **

(Lodged Sept. 28, 1943; Filed Oct. 8, 1943)

The above-entitled proceeding came on for hearing on the 23rd day of February, 1943, before the Hon. J. Russell Leech, Judge of the Tax Court of the United States at New York, N. Y., pursuant to notice of hearing theretofore given whereupon the following proceedings were had, to wit:

Appearances: Edgar J. Bernheimer, Esq. (1 South William St., New York, N. Y.), appearing on behalf of the Petitioner, by Sydney J. Schwartz, Esq., of Counsel. James C. Maddox, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, the Respondent.

Proceedings

Mr. Schwartz made a statement of the case on behalf of the petitioner and moved to amend the amended petition.

Mr. Maddox stated that there was no objection to the amendment on the part of the respondent and stated that
38 respondent did not want to file an answer to the present amendment but requested that the record show a general denial thereof. Thereupon the Court granted the motion for leave to amend as follows:

"Judge LEECH: The motion is granted. The record will show the filing of the amendment to the amended petition, service of a copy of the same on respondent and the entry of a general denial by the respondent."

Mr. Schwartz offered a stipulation of facts which was thereupon filed and became part of the record. Mr. Maddox thereupon presented an opening statement for the respondent and the Court made rulings as follows:

"Judge LEECH: The Court will rule now on the objection which we understand is as to the materiality, relevancy, and competency of Paragraphs 12 and 13 of the stipulation. The objection is overruled with an exception to the respondent.

"Mr. MADDOX: I think Mr. Schwartz pretty well covered the position of the respondent on the first issue. The respondent has included the full amount of the property, that is, the value of the property at the date of death that was transferred in trust on the grounds it was a transfer intended to take effect in possession and enjoyment at or after death.

"Judge LEECH: And therefore included at its same value.

"Mr. MADDOX: That is true. Under the Hallock case by reason of the fact that the gift after the life estate was retained in the grantor, was subject to the contingency of his death; if he survived the termination of the trust, the property would revert to him and by reason of that reverter the transfer comes within the principle of the Hallock case.

39 "There is also the other position, alternative position of the respondent that petitioner had the power to appoint this property. The petitioner says that power never came into being because he never had issue. The power was conditioned upon the decedent having issue. Respondent says that that makes no difference, that the possibility of having issue continued up to the time of his death and there are cases to the effect that conditions precedent do not prevent the property going into the gross estate, which will be fully covered in the brief.

"There are two other issues besides this trust issue, that Mr. Schwartz did not mention but perhaps I should.

"There is one item of the income that accrued to the decedent as of the date of his death. The respondent included an amount of $207.51 in the notice of deficiency. It was later determined that amount should have been $3,545.87. There is an agreement now between the parties that the gross estate should be increased by the difference, $3,338.36. That is covered by stipulation.

"There is also the question of credit for estate taxes. The stipulation covers that issue also. The amount paid is stipulated and the amount because of the second issue I mentioned, is indeterminate until we make a computation and there will perhaps be a necessity in any event making computation under Rule 50 and the

credit will be adjusted at that time. I have no further statement.

"Judge LEECH: Simultaneous original briefs on April 14 and reply briefs on May 3rd, 1943."

40 True copies of the stipulation of facts hereinabove referred to and the amendment to the amended answer have been heretofore filed and are made a part of this statement of evidence as if fully set forth herein. Petitioner tenders and presents the foregoing as his statement of evidence in this case and prays that the same may be approved by the Tax Court of the United States and made a part of the record in this cause.

EDGAR J. BERNHEIMER,
Attorney for Petitioner.

Approved Oct. 7, 1943.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.

Approved and ordered filed this 8 day of Oct. 1943.

J. RUSSELL LEECH,
Judge.

41 In United States Circuit Court of Appeals

For the Second Circuit

No. 202—October Term, 1943.

(Argued June 13, 1944. Decided July 13, 1944)

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before AUGUSTUS N. HAND, CHASE and FRANK, Circuit Judges.

Petition of taxpayer for review of a decision of the Tax Court of the United States, reported in 2 T. C. 21. Reversed and remanded.

Edgar J. Bernheimer (Sydney J. Schwartz of counsel), for petitioner. Samuel O. Clark, Jr., Sewall Key, Helen R. Carloss, and Robert Koerner, for respondent.

42 The facts as stipulated and found by the Tax Court are as follows:

Taxpayer's decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company,

as trustee, certain assets valued at the date of his death at the sum of $307,452.82. This value was included by the Commissioner in decedent's estate in computing the present deficiency. Summarized, the terms of this trust are:

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, *infra*. B. The income is to be paid to decedent for his life unless the trust terminates before his death. C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all is to be held in trust, for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each. D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced). E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue. F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none, then to decedent's brother or sister or
43 their issue. G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue. H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent. I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, he was survived by his two nieces, whose lives were to measure the maximum life of the trust, and they were then of the age of 18 and 25 years, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield.

The transfer in trust was not made in contemplation of death, nor did deceased at any time relinquish any power to alter, amend, or revoke the transfer or to change the enjoyment of the property transferred in contemplation of death.

It is conceded by the taxpayer that the value of the corpus of the trust, to the extent of $150,000 directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,562.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18.

44 The Tax Court sustained the Commissioner's determination of deficiency, holding that the value of the entire corpus of the trust at decedent's death, $307,452.82, was properly included in the gross estate.

Opinion

FRANK, Circuit Judge: In Helvering v. Hallock, 309 U. S. 106, 111, the Court said that "the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Precisely what that means has been a matter of much comment.[3] We do not agree with the Tax Court that Smith v. Shaughnessy, 318 U. S. 176, which dealt with a gift tax, aids decision here. Whatever we might now hold if this were for us a novel question, we need not consider, for the matter is governed in this circuit by our decisions in Commissioner v. Flanders, 111 F. (2d) 117 (C. C. A. 2) and Bankers Trust Co. v. Higgins, 136 F. (2d) 477 (C. C. A. 2). Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces. The resulting taxable value here is $24,930.76. We reverse with directions to the Tax Court to fix the tax on that value.

Reversed and remanded.

[3] See Paul, Federal Estate and Gift Taxation, Sec. 7.25.

45 In the United States Circuit Court of Appeals
Second Circuit

ESTATE OF LESTER FIELD, DECEASED, ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from The Tax Court of the United States

Judgment

Filed August 1, 1944

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and cause remanded to The Tax Court of the United States for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

46 (File endorsement omitted.)

47 (Clerk's certificate to foregoing transcript omitted in printing.)

48 Supreme Court of the United States

Order allowing certiorari

Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Fidelity-Philadelphia Trust Company et al. vs. Rothensies, No. 263.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[File endorsement on cover.] File No. 49031. U. S. Circuit Court of Appeals, Second Circuit. Term No. 578. Commissioner of Internal Revenue, Petitioner vs. Estate of Lester Field, Deceased, Barnett Hollander, Temporary Administrator and Executor. Petition for a writ of certiorari and exhibit thereto. Filed October 10, 1944. Term No. 578 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944

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612307—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 25–30) is reported in 2 T. C. 21. The opinion of the circuit court of appeals (R. 41–43) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 43). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value of property transferred in trust by the decedent should be included in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, as held by the Tax Court, or whether that value should be reduced so as to include only the value of a remainder payable at all events upon the death of the survivor of two of decedent's nieces, as held by the circuit court of appeals.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 8–11.

STATEMENT

The Tax Court found the following facts (R. 25–28):

Decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company, as trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by the Commissioner in decedent's estate in computing the present deficiency. (R. 25–26.)

Summarized, the terms of this trust are (R. 26–27):

> A. The trust is to continue for the joint lives of two nieces and the life of the sur-

vivor of them unless terminated earlier under F, *infra*.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none,

then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, decedent was survived by his two nieces whose lives were to measure the maximum life of the trust, and they were then 18 and 25 years old, respectively. He was also survived by his widow, Blanche Field, by his sister. Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield. (R. 27.)

It is conceded by the taxpayer that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling

it in its entirety. The value of a remainder in the sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18. (R. 27–28.)

The Tax Court held that the full amount of $157,452.82 was includible in the gross estate, but the court below reversed and remanded the case to the Tax Court with directions to include only $24,930.76 thereof. In so holding, the court said (R. 43):

> Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces.

But the two nieces did not have life estates, although their lives did measure the duration of the trusts. It must be assumed, therefore, that what the court meant was that the gift of the $157,452.82 must be reduced by discounting the value of the property for the period of the life expectancy of the survivor of the two nieces. In this way, the value of interests which might conceivably intervene between the death of the decedent and the

payment of the corpus would be excluded from the gross estate.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that there should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, on account of the transfer in trust here involved, only the value of a remainder payable in all events upon the death of the survivor of the decedent's two nieces.

(2) In not holding that the entire sum of $157,452.82 was properly includible as held by the Tax Court.

(3) In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 142 F. 2d 838 (C. C. A. 3d), petition for certiorari filed July 17, 1944, No. 263, this Term; and *Schultz* v. *United States,* 140 F. 2d 945 (C. C. A. 8th.) In both the *Fidelity-Philadelphia* and *Schultz* cases it was held that the full value of transferred property should be included in the gross estate under circumstances comparable to those here presented. In our memorandum filed in response to the petition for certiorari in the *Fidelity-Philadelphia Trust Co.* case, we admitted (p. 11) that there is a conflict with respect to the valuation question. Reference is here made to

that memorandum which sets forth our views in detail. The question is of importance in the administration of the estate tax.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature

of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and

Becker v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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622351—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 15–19) is reported in 2 T. C. 21. The opinion of the circuit court of appeals (R. 24–26) is reported in 144 F. 2d 62.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 27). The petition for a writ of certiorari was filed on October 10, 1944, and was granted on December 4,

1944 (R. 27). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value of property transferred in trust by the decedent should be included in his gross estate under Section 302 (c) of the Revenue Act of 1926, as held by the Tax Court, or whether that value should be reduced so as to include only the value of a remainder payable at all events upon the death of the survivor of two of decedent's nieces, as held by the circuit court of appeals.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT

The Tax Court found the following facts (R. 16–17):

Decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company, as trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by the Commissioner in decedent's estate in computing the present deficiency. (R. 16.)

Summarized, the terms of this trust are (R. 16):

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, *infra*.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be

none, to the issue of the decedent surviving; if none, then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, decedent was survived by his two nieces whose lives were to measure the maximum life of the trust, and they were then 18 and 25 years old, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield (R. 16–17).

It is conceded by the taxpayer that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the sum

of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18. (R. 17.)

The Tax Court held that the full amount of $157,452.82 was includible in the gross estate, but the court below reversed and remanded the case to the Tax Court with directions to include only $24,930.76 thereof. In so holding, the court said (R. 26):

> Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces.

But the two nieces did not have life estates, although their lives did measure the duration of the trusts. It must be assumed, therefore, that what the court meant was that the gift of the $157,452.82 must be reduced by discounting the value of the property for the period of the life expectancy of the survivor of the two nieces. In this way, the value of interests which might conceivably intervene between the death of the decedent and the payment of the corpus would be excluded from the gross estate (see, *infra*, p. 9).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that there should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926, on account of the transfer in trust here involved, only the value of a remainder payable in all events upon the death of the survivor of the decedent's two nieces.

(2) In not holding that the entire sum of $157,452.82 was properly includible as held by the Tax Court.

(3) In reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

The question involved in this case is the same as that fully considered in the memorandum and brief for the respondent in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, No. 263, this Term. It is there pointed out that the decision of this Court in *Helvering* v. *Hallock*, 309 U. S. 106, requires that the full value of the trust property be included in decedent's gross estate. While the Government conceded that the value of outstanding life estates should be excluded in the cases decided by the *Hallock* opinion, and this Court so held, there is no warrant for such exclusion here for the grantor retained a life estate, and all other estates created by the trust took "effect in possession or enjoyment" only "at or after" his death.

ARGUMENT

THE FULL VALUE OF THE TRUST PROPERTY AT DECEDENT'S DEATH SHOULD BE INCLUDED IN HIS GROSS ESTATE

The question presented in this case is also involved in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 142 F. 2d 838 (C. C. A. 3d), No. 263, this Term, which is to be argued immediately before this one. Since our views are fully set forth in our memorandum in response to the petition for a writ of certiorari and our brief on the merits in that case, we believe that it is sufficient, in this brief, to indicate that under the trust established by the decedent in this case his death cut off the possibility that the corpus of the trust would revert to him and that the beneficiaries named in the trust would, in fact, never come into enjoyment of the property.

The duration of this trust was limited to the lives of decedent's two nieces. If both died before the decedent, the corpus would have been paid to the decedent (pars. A and H, *supra*, pp. 3, 4). Not until his death, his nieces surviving, could it be known that any of the gifts in trust would be effective. Hence the court below recognized the applicability of the *Hallock* case and held the transfer in trust taxable under Section 302 (c) of the Revenue Act of 1926. Indeed, the circuit court of appeals rejected the taxpayer's contention that only the value of de-

cedent's "chance"[1] of regaining the corpus $891.18—*supra*, p. 5) should be included in the gross estate.

But the court below fell into error when it rejected the Tax Court's conclusion that the entire value of the property at decedent's death ($157,452.82—*supra*, p. 5) should be included in the gross estate and held that this sum should be discounted for the period of the life expectancy of decedent's two nieces—the period which measures the duration of the trust and at the end of which the corpus would at all events be payable. Viewing the situation as it in fact existed after the decedent's death, the decedent having died without issue, there is of course no warrant for such a reduction since the corpus was immediately payable to decedent's sister and the issue of his brother and there were no intervening estates.[2]

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[1] Cf. *Central Hanover Bank & Trust Company* v. *United States*, decided November 6, 1944 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,153).

[2] In the courts below, the Commissioner contended, in the alternative, that the trust instrument made no provision with regard to the amount in excess of the decedent's widow's share if the decedent had no issue. It was urged that upon the failure of issue, there was a resulting trust in favor of decedent's estate when he died (Restatement, Trusts (1935), Sec. 411, Comments (g) and (k)) so that the entire amount here in controversy should be included in the gross estate under Sec. 302 (c) or (a) without regard to the legal considerations which have given rise to the conflict asserted in the petition for a writ of certiorari. The court below did

The reduction ordered by the court below is understandable, if at all, when the situation is assessed as of the time just prior to the decedent's death. At that time it was conceivable that the decedent might have issue. If he did, the issue would take interests in the income and so put off the payment of the corpus until the death of the surviving niece at the latest. We have no quarrel with this approach. We do, however, urge that the possibility of an intervening income estate does not warrant a reduction in the amount to be included in the gross estate. The income estates would take effect in "possession and enjoyment" only after decedent died; they could not be outstanding estates within the meaning of the Treasury Regulation (Appendix, *infra*, p. 14). Hence the entire value at decedent's death should have been included.

We need add to our discussion in the *Fidelity-Philadelphia* case only by referring to *Central National Bank* v. *United States*, 41 F. Supp. 239 (C. Cls.), from which the taxpayer seeks to draw support for its position (Br. in response to petition, p. 8). In that case, the Court held that the value of the trust corpora there involved should

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not discuss that contention, however, and apparently accepted the taxpayer's view that this amount passed, under the trust instrument, to decedent's sister and the issue of his deceased brother. Throughout our argument, we have accepted that construction. Cf. *Helvering* v. *Stuart*, 317 U. S. 154, 163.

be reduced by the value of the income rights of the beneficiaries which were outstanding and unaffected by the decedent's death. That conclusion is in conformity with the Government's concession in *Helvering* v. *Hallock*, 309 U. S. 106, and is distinguishable from the instant situation where there was no outstanding estate, the decedent having reserved the income for life. It should also be noted that under circumstances almost identical with those here presented, the New York courts, construing subdivision 3 of Section 249–r of the New York Tax Law and undertaking to follow *Helvering* v. *Hallock*, *supra*, and *Klein* v. *United States*, 283 U. S. 231, held that the transfer was intended to take effect in possession or enjoyment at or after death and that the full value of the trust property should be included in the gross estate. *Matter of Pratt*, 262 App. Div. 240, affirmed, 289 N. Y. 621. The trust in that case, the duration of which was measured by the lives of decedent's son and niece, provided that the settlor should have the income for life and the principal if he survived his son and niece. The decedent did not survive his niece, and in that eventuality the trust provided that his issue or his brothers and sisters should have the income until the death of the niece, at which time the principal was to be payable. The New York Court of Appeals affirmed the Appellate Division in holding that the estate tax should be assessed

on the full value of the property in the trust fund at the date of the decedent's death.[3]

CONCLUSION

The ultimate disposition of the trust property in question was effectively suspended during the decedent's lifetime. There were no outstanding estates at the time of his death. The full value of the property should be included in the decedent's gross estate, and the judgment of the court below should, therefore, be reversed and the decision of the Tax Court reinstated.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

DECEMBER, 1944.

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[3] The Appellate Division said (262 App. Div. at 245):

"If we are to follow the Supreme Court decisions we must hold that the effect of the decedent's death was not merely to remove an impediment in the form of the grantor's reversionary interest, but to bring about affirmatively the transfer of title to the whole fund. The remainder, which then vested for the first time, is the fund to be taxed. (*Sargent* v. *White*, 50 F. [2d] 410.) We conclude that the tax is to be assessed against the full value of the trust fund at the date of the decedent's death."

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a ma-

terial part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull., 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932. These amendments are not applicable to this case since the trust was created in 1922. *Hassett* v. *Welch*, 303 U. S. 303.

death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940-1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

EDGAR J. BERNHEIMER
HARRY T. ZUCKER
Respondent's Counsel.

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IN THE

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OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

The facts sufficiently appear in the opinion of the learned court below (144 F. 2d 62). In its opinion the Circuit Court, mindful of the language of this court in *Helvering* v. *Hallock*,[1] where it was said:

> "The measure of the tax is the value of the transferred property at the time when death brings it into enjoyment,"

held that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life expectancies of the two nieces of the decedent whose lives were to measure the life of the trust (R. 42). Since the tax is concerned with a shifting of economic benefits

[1] *Helvering* v. *Hallock*, 309 U. S. 106.

(*Reinecke* v. *Northern Trust Company*[2]) it was properly held that the measure of the benefit alone be subject to tax (*Commissioner* v. *Flanders*,[3] *Bankers Trust* v. *Higgins*[4]). By its decision in the *Hallock* case this court in effect approved the minority opinion in *Helvering* v. *St. Louis Trust Company*[5] wherein Mr. Chief Justice Stone wrote (p. 46):

> "I think that the *value of that interest* was rightly subjected to the tax imposed by Section 302(c)"; (Italics ours.)

and later the learned Chief Justice wrote:

> "The section, in its scope and purpose, is thus similar to Section 302(d) which includes in the decedent's taxable estate *the value of his interest* held as joint tenant or tenant by the entirety although created by deed inter vivos. Tyler v. U. S., 281 U. S. 497; Philips v. Dime Trust & S. D. Co., 284 U. S. 160." (Italics ours.)

In *Commissioner* v. *Flanders, supra*, the learned court said (p. 121):

> "In view of the decision of the Supreme Court in Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. — , 125 A. L. R. 1368, handed down January 29, 1940, we hold the settlor's possibility of reverter a taxable interest under Section 302(c)."

In *Bankers Trust Company* v. *Higgins, supra*, the learned Circuit Court wrote (p. 478):

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[2]*Reinecke* v. *Northern Trust Company*, 287 U. S. 339, 346.
[3]*Commissioner* v. *Flanders*, CCA 2, 111 F. 2d 117.
[4]*Bankers Trust Company* v. *Higgins*, CCA 2, 136 F. 2d 477.
[5]*Helvering* v. *St. Louis Trust Company*, 296 U. S. 39.

> "The remainders were therefore relieved of a burden by his death; that relief was an 'interest' which 'took effect' at that moment by increasing the remainders *pro tanto*, and it was proper to include it in the estate under the doctrine of Helvering v. Hallock, supra, 309 U. S. 106, 60 S. Ct., 444, 84 L. Ed. 604, 125 A. L. R. 1368."

The decision of the learned court below was therefore clearly right.

The cases of *Fidelity-Phila. Trust Co.* v. *Rothensies*[6] and *Schultz* v. *U. S.*[7] are clearly distinguishable on their facts from the situation here presented.

Fidelity-Phila. Trust Co. v. Rothensies

It is quite true that in the above-mentioned case the Court held that the reservation of a reversionary interest rendered the corpus of the trust taxable to the extent of its full value.

The reasoning of the opinion there, however, excludes and exempts the similar taxation of the corpus of the trust in the instant case. In the *Fidelity-Phila. Trust Co.* case, the Court reached the conclusion that it had to deal with a transfer effective at or after death. This conclusion was arrived at in view of the peculiar and special provisions of that trust which resulted in the decision that the grantor "selected to hold in suspense the ultimate disposition * * * (the) property until the moment of * * * death."

In the *Fidelity-Phila. Trust Co.* case the decedent had created a trust reserving the income to herself for life and upon her death in equal shares to her two daughters during their respective lives with remainder to the descend-

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[6] *Fidelity-Phila. Trust Co.* v. *Rothensies*, CCA 3, 142 F. 2d 838.

[7] *Schultz* v. *U. S.*, CCA 8, 140 F. 2d 945.

ants of the daughters and (importantly) in the event of the death of the daughters without issue to such persons as the Trustor should appoint by Will. In that case the daughters were without issue at the time of the making of the trust (just as was the decedent in the instant case) but in that case such issue survived the Trustor. The decision was made expressly upon the ground as stated by the Court (p. 841):

> "Since the disposition of the estate was held in suspense until her death, that event compels the imposition of the tax. The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

The Court in the *Fidelity-Phila. Trust Co.* case in reaching the conclusion that it did recognize the necessity of distinguishing the *Kellogg* case, 119 F. 2d 54, and by this very necessity recognized the controlling effect of the *Kellogg* decision when applied to appropriate facts. In the *Fidelity-Phila. Trust Co.* case the Court said (p. 840):

> "The case at bar is distinguishable from the Kellogg case on which the appellant strongly relies for in that case, as we have stated, 119 F. (2d) at p. 57, '* * * the fact of importance * * * is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could.' Kellogg retained nothing. He had merely a possibility of reverter."

In the case at bar even in the absence of issue of the decedent or upon the failure of such issue to survive, the corpus of the trust is completely disposed of to the brother and sister of the decedent. In the case at bar such brother

and sister at all times possessed a vested remainder subject to be divested only by the birth of issue of the decedent which in fact never occurred. In the case at bar it could not be said that the disposition of the estate was held in suspense until the donor's death, but rather more nearly as was said in the decision in the *Kellogg* case (*supra*, p. 57), the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could. Similarly as was said in Kellogg's decision (p. 56):

> "possible transmission to the next of kin was dependent not upon the grantor's death, but upon the death of various intermediary persons who were all living at the date of the grantor's death."

and as was affirmed in the opinion of the *Kellogg* case (p. 56):

> "The decedent's death had no effect on any specified interest of his children or on any potential interest of his next of kin in the property sought to be taxed as a part of his estate."

In the *Fidelity-Phila. Trust Co.* case it was necessarily the death of the donor which established finally and definitively the disposition of the corpus of the trust, whereas in the instant case the death of the donor was not a necessary factor. In actuality it had no effect upon the final disposition of the corpus other than to dispose of the mere possibility of reverter which theretofore had been vested in the decedent.

Schultz v. *U. S.*

In this case the proceeds of certain life insurance policies which were retained by the insurance company and upon

which interest was paid to the insured for life with remainder over on his death, were held to be included in insured's gross estate in computing estate tax under the Revenue Act of 1926, Section 302 (c) as amended. As its controlling reason the court held and declared (p. 948):

> "Here, as in the Hallock and Klein cases, the interests granted decedent's wife and daughter by the settlement provision incorporated in the policies were contingent upon their survival of decedent. Only decedent's death gave those interests 'definitive measure.' The death of the decedent was the 'indispensable and intended event' which brought the interest of the wife and daughter into being and 'effected its transmission from the dead to the living'. Klein v. United States, supra, 283 U. S. at page 234, 51 S. Ct. at page 399, 75 L. Ed. 996."

At page 949 the court said that it would "regard the proceeds of the policies involved in the case at bar as coming to the beneficiary *through the death of the insured*". (Italics ours.)

In its discussion of the facts in the *Schultz* case, the court declared at page 947:

> "If the policies matured as endowments, the amounts payable under them were to be retained by the company and interest thereon at the rate of $2.47 per thousand dollars was to be paid to Herman E. Schultz, Jr., for life, as beneficiary, and then to his wife *as contingent beneficiary for her life if she survived the insured*." (Italics ours.)

These facts and the enunciated reasons for the conclusion of the court based upon the facts in the *Schultz* case, differentiate it diametrically from the case here. In the case

at bar it was not, to paraphrase the decision in the *Schultz* case (p. 948), only decedent's death that "gave those interests definitive measure", and to continue the paraphrase, the death of the decedent was not "the indispensable and intended event" which brought the interest of the remaindermen into being. On the contrary in the case at bar, as declared in the *Reinecke* case, *supra*, at page 346, "the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made", and as said in *Commissioner of Internal Revenue* v. *Kellogg*, *supra*, at page 56:

> "Hence, the decedent's death had no effect on any specified interest of his children or on any beneficial interest of his next of kin in the property sought to be taxed as a part of his estate";

and later, at page 57,

> "We think that the fact of importance in the case is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could.

In fact, the case at bar would seem to come expressly within the theory declared by the court in the *Schultz* case (p. 948) in its discussion of *Helvering* v. *Hallock*, *supra*:

> "The court held the transfers complete as of the execution of the trusts on the ground that there was no shifting of economic interests in the trust property taking effect at or after the death of the settlor. The interests of the beneficiaries were complete upon the execution of the trusts. The settlor's death determined only the time of enjoyment of those in-

terests by the beneficiaries. It could not diminish nor increase the interest transferred."

Under the trust instrument in question (R. 6-17) the death of the decedent donor was not and could not be the generating cause of the transfer. Only the death of the two measuring lives could have been the generating cause of any such transfer.

Although *Fidelity-Phila. Trust Co.* v. *Rothensies, supra,* and *Schultz* v. *U. S., supra,* cited by petitioner are readily distinguishable on their facts as stated from the situation here presented, we feel that in the light of the court's language in *Helvering* v. *Hallock, supra,* and the dissenting opinion in *Helvering* v. *St. Louis Trust Company, supra,* we must perforce register our accord with the view of the Solicitor General that conflict exists between the *Fidelity* and *Schultz* cases and the decision in this case. The *Fidelity* and *Schultz* cases appear also to conflict with *Commissioner* v. *Flanders, supra, Bankers Trust Company* v. *Higgins, supra, Commissioner* v. *Kellogg,*[8] *Lloyds Estate* v. *Commissioner*[9] and *Central National Bank of Cleveland* v. *U. S.*[10]

It may be that the court will, therefore, grant the Commissioner's petition for certiorari. If the court be so minded, it is prayed that the cause be set down for argument immediately after *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* No. 263 October 1944 Term, in which certiorari was granted.

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[8]*Commissioner* v. *Kellogg,* CCA 3, 119 F. 2d 54.

[9]*Lloyds Estate* v. *Commissioner,* CCA 3, 141 F. 2d 758.

[10]*Central National Bank of Cleveland* v. *U. S.,* Ct. Cls. 41 F. Supp. 239.

We are permitted to say that the Solicitor General has indicated that he has no objection to the foregoing procedure.

Respectfully submitted,

EDGAR J. BERNHEIMER
HARRY T. ZUCKER
Respondent's Counsel.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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December, 1944.

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BRIEF FOR RESPONDENT

The question presented and the statement appearing in the brief for the petitioner are correct and are here adopted. The transfer was not made in contemplation of death (R. 25). The transfer was not taxable by reason of decedent's reservation of income during his life, since the transfer was made prior to March 3rd, 1931. *Hassett* v. *Welch*, 303 U. S. 303.

SUMMARY OF ARGUMENT

Decedent's only interest at the time of his death in the portion of the trust representing the excess over the widow's fund (which was conceded to be taxable) was a contingent right to receive such excess if he survived his two nieces

who constituted the measuring lives of the trust. This interest, found to have an actuarial value of $891.18, was discarded by the Circuit Court as the true measure of decedent's interest and instead the court fixed upon the value found by the Tax Court of $24,930.76 as the true ~~revenue~~ measure of the tax. This sum represented the value of decedent's right to receive the corpus after allowance for the life expectancies of the measuring lives. The statute involved is an estate tax and not a succession tax, and only the interest of the decedent in the trust property was properly taxable. Since under New York law the brother and sister had vested remainders, the only interest or right which passed or was transferred or terminated as a result of decedent's death and which resided in decedent at his death, was the possibility of reverter or reversionary interest which at the maximum could not exceed the value of $24,930.76 as found by the Tax Court. Only this amount was theretofore includible in the gross estate.

THE NATURE OF THE TAX INVOLVED AND THE INTEREST SUBJECT TO THE EXCISE

During the lifetime of decedent's two nieces (their lives constituted the measure of the trust) no act of decedent could alter the operation of the trust instrument or affect the devolution of the property involved, and the trust instrument, not the death of the donor, was the generating source of the transfer. The property passed from the trustee which had the legal title (R. 4), not from decedent.

cf. *May* v. *Heiner*, 281 U. S. 238;
Reinecke v. *Northern Trust Company*, 278 U. S. 339.

If Paul's statement of the principle is to be fully accepted, to wit, "that under an estate tax something must be transferred, or passed, or terminated at death, to serve as justification for the excise tax taken from the estate" (Paul, *Federal Estate and Gift Taxation*, Section 7.04, p. 293), the Commissioner finds himself in somewhat of a dilemma to justify inclusion of the whole of the corpus in the gross estate. Legal title to the corpus passed, the fund passed out of the decedent's possession and control, and the interests of the beneficiaries became fixed, all in 1922, when the trust was created. Under the applicable* New York rules for the construction of the instrument: (*Farmers Loan & Trust Company* v. *Callan*, 246 N. Y. 481, 487-90; *Matter of Fordham*, 235 N. Y. 384, 387-9; *U. S. Trust Co.* v. *Hogencamp*, 191 N. Y. 281, 284-5; *Roosa* v. *Harrington*, 171 N. Y. 341, 348; *Williams* v. *Jones*, 166 N. Y. 522, 532-3; *Matter of Blumenthal*, 124 Misc. 850, 853) there was vested by the trust instrument in the donor's brother and sister absolute title to the remainders after the donor's lifetime subject only to such remainders being divested by their own death or by the birth and survival of issue of the donor or the termination of the trust by the deaths, prior to the donor's, of the donor-decedent's two nieces.

> *New York Real Property Law*, Sections 40, 51, Appendices A & B.

Subject to the possibilities mentioned, therefore, the transfer was "complete" (cf. dissenting opinion of Chief Justice Stone, *Helvering* v. *St. Louis Union Trust Company*, 296 U. S. 39, 46; *Reinecke* v. *Northern Trust Com-*

Helvering v. *Stuart*, 317 U. S. 154.

pany, 278 U. S. 339, 345; *Klein* v. *United States,* 283 U. S. 231).

What the donor retained in the case at bar was a reversion (sometimes called a possibility of reverter) in the event that he survived the measuring lives. It is this reversion and it alone which constitutes the property to which the "string" was attached. The respondent contended below that this possibility of reverter should be included in the gross estate at its actuarial value to the decedent at the time of his death. This contingent interest or possibility of decedent's acquiring the reversion was valued and found by the Tax Court to be $891.18 (R. 17), the corpus of the fund involved being $157,452.82 (R. 17). It was argued by the Commissioner below that this valuation, representing as it does merely the possibility of decedent's survival of the measuring lives, was a valuation of the "string" merely and not of the "package". The Circuit Court proceeded to fix the value of the "package" at $24,930.76, the value of a remainder absolute in $157,452.82 after excision of the expectancy of the two measuring lives.

The death of the decedent during the lifetime of his nieces extinguished only the possibility of decedent's acquiring the reversion. The transfer itself was irrevocable, and decedent under no circumstances could change the ultimate disposition of the property. His death was not the "generating source" of any transfer although his death can be properly said to have accelerated the time of enjoyment of the property by the beneficiaries. The decedent's death served merely to extinguish a property right which the decedent had retained which was actually worth $891.18 to him and which under no circumstances could be worth more than $24,930.76 (R. 17) to anyone discounting all contingencies.

Perhaps a clearer view of the precise factual situation can be obtained if for the moment we consider that decedent instead of reserving a life estate to himself gave the use of the property transferred to third persons during the lives of his nieces and retained the reversion to himself in the event that he survived the measuring lives of the trust. In that event there would be no doubt, and petitioner appears to concede (Respondent's Brief, No. 263, page 7), that the value includible in the gross estate would be the value of the assets transferred less the life interests measured by the lives of the two nieces. This is the actual reversion found by the Tax Court to be of the value of $24,930.76 and is the maximum interest passing at death which might be here properly taxed.

The Commissioner's argument in *Fidelity-Philadelphia Trust Co.* v. *Rothensies* (No. 263 this Term, page 9) wholly ignores the nature of the Federal Estate Tax Law as an estate tax and not a succession tax (*N. Y. Trust Company* v. *Eisner*, 256 U. S. 345; *Y. M. C. A., et al.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 63-3; *Nichols* v. *Coolidge*, 274 U. S. 531, 541) and as a tax related primarily to property owned by the decedent at the time of his death (Paul, *Federal Estate & Gift Taxation*, Volume 1, 4.04 p. 184-5, 7.04 p. 293); nor we submit is it a "transaction" tax. Moreover the tax by the mandate of the statute is expressly limited to a levy upon the value at the time of death of all property *"to the extent of any interest therein* of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after death." The statute does not attach the tax to *transfers intended to take effect at or after death*

but only to "transfers to take effect in possession or enjoyment at or after death" (c.f. Harsch & Kaminoff, "Transfers Intended To Take Effect In Possession Or Enjoyment At Or After Transferor's Death Under The Federal Estate Tax", 15 Washington Law Review and State Bar Journal, 19). (Italics ours.) Nor is there encompassed in the tax "all property * * * of which the decedent had at any time during life made a transfer."

It was not decedent's death which vested the remainder in possession—it was the absence of issue of deceased which accelerated possession of the remainders instead of postponing possession until the death of the issue (cf. *Estate of Horatio Gates Lloyd* v. *Commissioner*, (C. C. A. 3rd) 141 F. 2d. 758).

Except for the possibility of reverter, decedent for the period of the lives of his two nieces gave away all that he had possessed or owned in the property transferred by irrevocable trust. What he so gave absolutely during his life could not be taxed to him at death. (*May* v. *Heiner, supra; Reinecke* v. *Northern Trust Co., supra; Shukert* v. *Allen*, 273 U. S. 545; *Helvering* v. *Proctor*, 140 F. 2d 87; *U. S.* v. *Brown*, 134 F. 2d 372; *Commissioner* v. *Kellogg*, 119 F. 2d 54. Since, as stated, the statute involved is an estate tax which taxes only property transferred at death by a decedent and does not tax the succession when received, only that which passed from the decedent at his death and which had not been transferred during life, to wit: the reversion or possibility of reverter having a maximum value of $24,930.76, could properly be the subject of tax. This value was all that the decedent owned in the property transferred during life which might be subjected to estate tax. What the remaindermen received was partly an inter-

est conveyed during life (to the extent of the value of the estate measured by the lives of the nieces) and partly an interest "transferred" at death by the "termination" of the possibility of reverter (which reverter could only have occurred upon the death of the survivor of the nieces, both of whom are still alive).

There is not present in this trust made in 1922, "the thought of avoiding taxes". (*Shukert* v. *Allen, supra*), "the transfer was not inchoate and imperfect", (*Burnett* v. *Guggenheim,* 288 U. S. 280, 284), the transfer was "complete" when made (*Reinecke* v. *Northern Trust Company, supra*), the donor no longer had "dominion", (*Corliss* v. *Bowers,* 281 U. S. 376, 378), and only the termination of the lives of decedent's two nieces, events over which decedent had no control, would have reinvested him with the property.

A complete change of "economic benefits" over the corpus of the trust together with the transfer of title and possession in the trustee for the beneficiaries took place in 1922 (cf. *Burnett* v. *Guggenheim, supra*), and the property so far as concerned the decedent-donor's right to deal therewith was placed beyond "recall". (*Burnett* v. *Guggenheim, supra,* page 288; *Shukert* v. *Allen, supra,* p. 547.) Decedent's death did not effect the final distribution of the remainder interest which was fixed by the trust instrument, nor were the identity of the distributees nor the quantum of the final gifts affected by decedent's death (cf. Estate of Margaret Durbin Sibley, Tax Court October 28, 1944, Prentice-Hall par. 64718, TC Memo Service Prentice-Hall, 44347). That decedent retained a life estate in the property is of no moment, for the enjoyment of some fruits of ownership is not incompatible with ownership of the property in others. *U. S.* v. *Union Trust Co.,* 90 F. 2d 702; *Smith* v. *Commissioner,* 59 F. 2d 533; *Bingham* v. *White,* 31 F. 2d 754.

While this court made plain (*Helvering* v. *Hallock*, 309 U. S. 106) that no niceties of conveyancing would be operative or effective to avoid the estate tax where control of the corpus of an inter vivos trust was retained in the decedent and the shift in economic benefits took place as a result of death, we do not take this to mean that the court contemplated or intended the inclusion in the gross estate of property interests in or over which the decedent had no title or estate or ownership or control (cf. *May* v. *Heiner*, *supra*), nor do we admit that the rule of the *Hallock* case is applicable to support the proposition that a greater valuation as upon a greater estate could or would be found than the actual estate and interest inhering in the decedent at his death.

THE MEASURE OF THE TAX ON DECEDENT'S INTEREST

As indicated above, decedent's brother and sister immediately upon the execution of the trust instrument had vested remainders subject to be divested. While "the law of vested and contingent remainders is full of casuistries" (*Helvering* v. *Hallock*, *supra*, p. 117), this court in *Klein* v. *U. S.*, *supra* (which was specifically reaffirmed in the *Hallock* case) recognized the distinction between vested and contingent remainders (*cf. Reinecke* v. *Northern Trust Company*, *supra*, p. 345, cases cited footnote 4, p. 117, *Helvering* v. *Hallock*, *supra*). Indeed, the court in determining the interest subject to tax is bound to take into account the extent of decedent's interest under the applicable New York law (*Helvering* v. *Stuart*, *supra*).

Quaere, having regard to the fact that the tax is not a succession tax, whether a levy upon the whole of the

corpus of the estate, remainder interests in which were vested in the brother and sister of the decedent, would not be in conflict with the Fifth Amendment, since the burden of the tax falls upon their property (*cf. Heiner* v. *Donnan,* 285 U. S. 312, 327; *Hassett* v. *Welch,* 303 U. S. 303; *Mackey* v. *Commissioner of Internal Revenue,* 94 F. 558; *Pierce* v. *Clauson,* 21 F. Supp. 259). The remaindermen took their interests from the trustee not from decedent's estate. The only benefits the remaindermen might be held to have "received" or which was "transferred" from the decedent's estate was the value of the possibility of reverter which terminated at decedent's death. (*Cf.* Surrey & Aronson, *Inter Vivos Transfers and the Federal Estate Tax,* 32 Columbia Law Review, 1332-1353.) In the *Reinecke* case, *supra,* the court said, page 347 of the Revenue Act under consideration:

> "In its plan and scope the tax is imposed on transfers at death or made in contemplation of death and *is measured by the value at death of the interest which is transferred.*" (Italics ours.)

The Court of Claims in *Central National Bank of Cleveland* v. *United States,* 41 F. Supp. 239, 248 said:

> "The Act therefore expressly says that there should be included in the gross estate only *that interest* which was intended to take effect in possession or enjoyment at or after death. It must follow therefrom that the interest in the property which had already vested in the beneficiaries and which was not transmitted by death is to be excluded from the gross estate."

In *Bryant* v. *Helvering,* 309 U. S. 106, this court did not reject the contention that only the vested reversionary

interest was properly the subject of tax, and in *Klein* v. *U. S., supra,* this court affirmed a judgment which included only the value of the remainder interest which constituted the decedent's possibility of reverter after deducting the value of the interests fully transferred during life (*cf.* Everett, *"Valuation of a 'Possibility of Reverter' Under the Hallock Case"*, 18 Taxes, 611, 612, 613).

In *Commissioner* v. *Flanders* (111 F. 2d 117) and in *Bankers Trust Company* v. *Higgins* (136 F. 2d 477), the possibility of reverter was held a taxable interest in the one case and the extent of the increase of benefit to the remainders by the release of a burden in the other case, was held to be the measure of the value of the interest passing as a result of the decedent's death. To similar effect, *Commissioner* v. *Schwarz,* 74 F. 2d 712.

Attention is respectfully directed to the language of the learned Chief Justice in the dissenting opinion in *Helvering* v. *St. Louis Trust Company,* 296 U. S. 39, where it was said, page 46:

> "Decedent in making disposition of his property by trust deed, retained a valuable interest in the property by which he postponed a final disposition of it until his death. I think the *value of that interest* was rightly subjected to the tax imposed by Section 302(c)."

and later, p. 47:

> "However we label the device, it is but a means by which the gift is rendered incomplete until the donor's death. *The extent to which it is incomplete marks the extent of the 'interest' passing at death, which the statute taxes."* (Italics ours.)

In *Lloyds Estate* v. *Commissioner of Internal Revenue, supra,* the court tested the taxability of an *inter*

vivos transfer by the ability of the transferor to reclaim his property and by the existence of a reserved interest which passed to others on his death. The court there held that the possibility of reverter in the settlor was so remote that it did not constitute a "transfer intended to take effect in possession or enjoyment at or after death". The court did not, because not called upon by the case, determine what if any value should be assessed upon the contingent reversionary interest which terminated by decedent's death (p. 763).

In our brief upon the application for the writ of certiorari we discussed the inapplicability for the reasons there appearing, of *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 142 F. 2d 138 and *Schultz* v. *U. S.*, 140 F. 2d 945.

CONCLUSION

The Commissioner in effect seeks a construction of the statute which does not limit the tax to "the interest of the decedent." He seeks to include any property which vests in possession or enjoyment upon the death of the decedent in which the decedent at any time had an interest, however thin the string over any portion of the property. As we have demonstrated above such is not the true nature or effect of the statute, only the interest of the decedent in the transferred property being subject to the excise.

The interest of the decedent is determined by the *inter vivos* instrument. Decedent had no power of recall over the property and left himself no power to resume ownership or possession except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition

on his part was concerned. After the execution of the trust, apart from his life estate, he had only a possibility of reverter over a value of $24,930.76 which alone constituted the interest which terminated at death and which would thus be taxable.

Respectfully submitted,

EDGAR J. BERNHEIMER
HARRY T. ZUCKER
Respondent's Counsel

December, 1944.

APPENDIX "A"

Section 40. When future estates are vested; when contingent.

A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

APPENDIX "B"

Section 51. Future estates in the alternative.

Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 578.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF LESTER FIELD, Deceased, BARNETT HOLLANDER, Temporary Administrator and Executor.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF *AMICUS CURIAE.*

CHARLES ANGULO,
Amicus Curiae.

THE COURT PRESS, N. Y. C.

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BRIEF *AMICUS CURIAE.*

Statement.

We are submitting this *amicus* brief (with the consent of counsel herein) in behalf of the estate of John C. Duncan, deceased, which is the petitioner in a proceeding now pending in The Tax Court of the United States involving the same basic question as that presented in the case at bar.

The facts in the *Duncan* case are briefly these: On January 23, 1924, the decedent created an irrevocable *inter vivos* trust the provisions of which may be summarized as follows: The duration of the trust, or the trust term, was measured by the lives of the decedent's son, John C. Duncan, Jr., and his only grandson then living John C. Duncan, III, who were then, respectively, 29 and 3 years of age. During such

trust term the income was payable to the decedent so long as he was living, and after his death, to his said son so long as the latter was living, and after the death of both of them to the issue of the decedent's said son surviving from time to time, until they, respectively, attained the age of thirty-five years when their share of the principal would become distributable to them. In the event that no such issue attained the age of thirty-five years, the corpus was distributable to the decedent's brother and sister and their descendants.

However, the trust agreement provided that if the trust term ended while the decedent was still living, the *corpus* of the trust was to revert to him. Actually the decedent predeceased both his son and grandson.

The Commissioner included in the gross taxable estate of the decedent not only the remainder interests in the trust *corpus* which were subject to the reversionary interest in the decedent, but also included the life interests in the trust income which the decedent had transferred to his son and grandchildren and which were subject only to the life interest (as distinguished from the reversionary interest) which the decedent had reserved.

Argument.

The statute here involved (§302 of the Revenue Act of 1926, as amended; Internal Revenue Code, §811) in so far as material requires that in determining the gross taxable estate of a decedent, the following property be included:

> "(e) *To the extent of any interest therein** of which the decedent has at any time made a trans-

* Italics supplied throughout.

> fer by trust, or otherwise, * * * intended to take effect in possession or enjoyment at or after his death * * *."

The statute does *not* purport to require the inclusion in such gross estate, of the *whole* of a given piece of property in respect of which the decedent has made a transfer of "any interest therein" intended to take effect in possession or enjoyment at or after his death; but, on the contrary, by its very terms provides for the inclusion in such gross estate of *only* the particular interest which was thus transferred.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, the Court said:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of *the interest which is transferred.*"

In *Central National Bank of Cleveland* v. *U. S.*, 41 F. Supp. 239, 248, it was stated:

> "The Act, therefore, expressly says that there should be included in the gross estate *only that interest* which was intended to take effect in possession or enjoyment at or after death."

Therefore, in order to determine whether a particular interest is required to be included in the decedent's gross taxable estate, we must consider the character of the transfer which the decedent made of *that particular interest.*

Thus, for example:

(1) If prior to 1931, A makes a present irrevocable transfer in trust, reserving the income to himself for life and providing that at his death the principal shall go to B, the transfer of the said interest to B is not regarded as a transfer "intended to take effect in possession or enjoyment at or after death", and accordingly on A's death the said interest transferred to B is not included in A's gross taxable estate. This type of transfer is governed by *May* v. *Heiner*, 281 U. S. 238. Whether B's interest is an estate for life or in fee makes no difference. In either case such interest is not includible in A's gross taxable estate (*Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; and *Hassett* v. *Welch*, 303 U. S. 303). Naturally, if the interest transferred to B is only a life estate, then the reversion remains in A and is taxable on A's death the same as any other property which he then owns. However, the outstanding life interest in B is not so taxed because A absolutely divested himself of such interest during his life (*May* v. *Heiner*, *Burnet* v. *Northern Trust Co.*, *McCormick* v. *Burnet* and *Hassett* v. *Welch*, all *supra*). The mere possibility that owing to B's premature death his life interest might never take effect in actual possession or enjoyment, is immaterial. The ownership of it became absolutely vested in him when it was transferred. A's death can neither add nor detract from such ownership. It can merely "obliterate" A's life interest, whereupon B's would come into actual enjoyment.

(2) If, on the other hand, A makes a present irrevocable transfer in trust under which the income

goes to B for life and on B's death the principal reverts to A if then living, but otherwise goes to C, then, even though A predeceases B, the transfer of the said interest to C is in effect disregarded and, accordingly, such reversion or remainder is subjected to tax at A's death as if he actually owned it at that time. However, the transfer of the life interest to B is not so treated and thus is not included in determining A's gross taxable estate. This is *Helvering* v. *Hallock*, 309 U. S. 106; *Klein* v. *United States*, 283 U. S. 231.

It is true that in both types of transfer the interest transferred by A cannot take effect in actual possession or enjoyment until after his death. The only difference between them is that in one the interest transferred is subject to a preceding life estate in the decedent, and in the other the interest transferred is subject to a reversion in the decedent. But the question here is not whether the distinction between the two types of transfer is based upon sound logical grounds. That inquiry is no longer relevant, because the distinction is now made by statutory mandate, as regards trusts created prior to the Joint Resolution of March 3, 1931 (*Hassett* v. *Welch*, 303 U. S. 303).

Here we have a legislative history quite different from that considered in *Helvering* v. *Hallock*, *supra*. In the *Hallock* case the taxpayer was relying on mere inferences which he sought to draw from the *silence* of Congress in failing to amend the statute notwithstanding the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39 and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48. Here we have *affirmative* evidence of the Congressional intention, as pointed

out by this Court in *Hassett* v. *Welch*, *supra*. Thus the statute in effect provides, as regards trusts created prior to the Joint Resolution of March 3, 1931, that *May* v. *Heiner* shall govern.

In *May* v. *Heiner* the decedent had created an irrevocable trust the income of which was payable to her husband for life, and after his death to herself for life; upon the death of the survivor the *corpus* became distributable to their children. The record did not disclose whether or not the decedent had survived her husband, but the Court specifically said that this was immaterial; in either case, the Court held, the transfer "was not testamentary in character". Thus the Court assumed for the purposes of the decision that the decedent, Mrs. May, had survived her husband; nevertheless, it held:

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

Hence, the point decided in *May* v. *Heiner* was this: That the mere "falling in", that is to say, the taking effect in actual possession or enjoyment, of estates or interests upon the termination of a preceding life estate, does not constitute a transfer which is subjected to tax by the statute. This is true whether the decedent himself has reserved the preceding life interest, or whether he has transferred it to some one else, or whether some one else has created it in his favor; all three of these situations stand on precisely the same footing.

That such was the holding in *May* v. *Heiner* is made even clearer by an examination of the earlier case of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, upon which the decision in *May* v. *Heiner* was squarely based. Almost one-third of the opinion in *May* v. *Heiner* is devoted to the *Reinecke* case. Under one of the trusts involved in the *Reinecke* case the income was payable to a beneficiary other than the decedent, either until five years after the decedent's death, or until the death of such beneficiary if he survived the decedent, at which time the *corpus* became distributable. In rejecting the Government's contention that the transfer was one intended to take effect in possession or enjoyment at or after death, this Court said, at page 347:

> "But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen *after the testator's death*, as directed, and after the enactment of the statute, is included within its taxing provisions. * * *
>
> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life

estate in one with remainder over to another at or after the donor's death."

Thus the *Reinecke* case established that the mere passing of the actual possession or enjoyment of the property from the holder of a preceding life interest therein to the holder of the next succeeding interest, was not a transfer subjected to tax by the statute, even though the event which fixed the time of such passing was the decedent's death.

May v. *Heiner* extended this same principle to cases where the preceding life interest had been reserved by the decedent himself. Thus it held that when the estates or interests subject to such reserved life estate take effect in actual possession or enjoyment at the decedent's death, there is no taxable transfer—not any more so than if the preceding life estate had also been transferred absolutely by the decedent in his lifetime to some one else, or had been created for the decedent's benefit by some one other than himself.

By way of illustration, let us apply the foregoing to the facts in the *Stinson* case (*Fidelity-Philadelphia Trust Co.* v. *Rothensies* #263) which is being heard with the case at bar. There the decedent in 1928 created an irrevocable trust under which the income was payable to herself for life, and after her death, to her two daughters and the survivor of them during life. At most, all that the decedent reserved (in addition to her life estate) was the right to dispose of the *corpus* of the trust by her will, *but subject to the said life estates in favor of her daughters.* It will be noted that the transfer of the said life interests to the daughters was absolute. The Court

below recognized this in its opinion (142 F. (2d) 838), in which it stated, at page 841:

> "The rights of the beneficiaries *other than those of the grantor's daughters* could not become absolute until the death of the grantor * * *."

Nevertheless, the Government contends, and the Court below held (142 F. (2d) 838), that these life interests so transferred to the daughters must be included in decedent's gross taxable estate. Such a result, we submit, is plainly contrary to *May* v. *Heiner*.

The Government's main point seems to be that until the death of Mrs. Stinson it could not be known whether the life estates which she had given to her daughters would actually take effect in possession or enjoyment. But this same statement would also have been true, *mutatis mutandis*, in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; *Morsman* v. *Burnet*, 283 U. S. 783; and *Hassett* v. *Welch*, 303 U. S. 303, in which *May* v. *Heiner*, *supra*, was applied.

In *Burnet* v. *Northern Trust Co.*, *supra*, the trust was to continue until the youngest of the surviving children of the decedent and the children of a stepdaughter attained the age of twenty-one years or until the death of all of the decedent's children and said stepdaughter, whichever should happen last, and during such trust term the income, after the death of the decedent, was payable to the decedent's children or their issue surviving from time to time; on the termination of the trust the principal was distributable to the decedent's issue and the issue of the said stepdaughter then living (Record on Appeal, pp. 8, 9, 16, 17).

In *McCormick* v. *Burnet*, *supra*, the income of the trust after the death of the decedent was payable to her children during their lives, and after their death the principal was distributable either as they appointed by will or to their then surviving issue (Record on Appeal, pp. 18, 19).

In *Morsman* v. *Burnet*, *supra*, the income of the trust after the decedent's death was payable to her sons so long as they were living during a period of two years after the decedent's death. On the termination of the trust the principal was distributable to the sons if living or if then dead to their then surviving issue (Record on Appeal, p. 16).

In *Hassett* v. *Welch*, *supra*, the income of the trust after the death of the decedent was payable to his nephews and nieces during their respective lives, and upon the termination of the trust the principal was payable to their then living issue (Record on Appeal, pp. 105-106).

Thus, in all of the cases the decedent (as the decedent in the *Stinson* case and in the case at bar) had created life estates in favor of other persons which were to take effect in possession or enjoyment after the decedent's death. Nevertheless, such life estates were held not to be includible in the gross taxable estate of the decedent.

It is no answer for the Government to say that in the *Stinson* case (as in the case at bar and our *Duncan* case) it could not be known until at or after the decedent's death whether any of the interests which he had transferred would actually take effect in possession or enjoyment. Assume that prior to 1931 the decedent had irrevocably conveyed to various persons successive legal life estates in real estate which he then owned, subject, however, to a reserved life estate in himself. Surely, in valuing the rever-

sion which remained in the decedent and passed upon his death, no one would contend that the said legal life estates owned by persons who were still living, should be disregarded. And yet in the hypothetical case it would also be true that it could not be known until at or after the decedent's death whether any of the interests transferred by the decedent during his lifetime would actually take effect in possession or enjoyment. Indeed, even in *May* v. *Heiner* and the above cited cases in which it was applied, there was certainly a *possibility* that none of the interests transfered by the decedent would take effect in actual possession or enjoyment. In practically all *inter vivos* trusts as ordinarily created, there is an inherent *possibility* of the property ultimately passing as part of the settlor's estate. It is submitted, therefore, that the transfer by Mrs. Stinson of the said interests in favor of her daughters is governed by *May* v. *Heiner* and the above cited cases in which it was applied.*

---

* *Klein* v. *United States*, 283 U. S. 231 (upon which *Helvering* v. *Hallock* was based) was argued in this Court on the same day as *Burnet* v. *Northern Trust Co.*, *Morsman* v. *Burnet* and *McCormick* v. *Burnet*, all *supra*, which were based upon *May* v. *Heiner*. Obviously, this Court could not have regarded the decision in the *Burnet* cases as being in conflict with the decision in the *Klein* case. In the *Klein* case the transfer of the remainder was held taxable because such remainder was subject to a preceding reversion which the decedent had reserved. On the other hand, the life estate which the decedent had conveyed to the widow and which had precedence over the reversion was held not to be taxable. In the three *Burnet* cases the interests which the decedent had transferred were held not to be taxable because they were subject only to the life estate which the decedent had reserved, notwithstanding that until the decedent's death it could not be known which of these interests would actually vest in possession or enjoyment. Obviously, the Court regarded this latter circumstance as immaterial. Therefore, we submit that in respect of transfers made prior to 1931, the test for determining whether a transfer of a particular interest is taxable is whether such interest is merely subject to a preceding life estate reserved by the decedent or whether it is subject to a reversion so reserved.

The Treasury Regulations [Treas. Reg. 80, Art. 17 as amended by T. D. 5008, 1940, 2 C. B. 286, 287, printed in Appendix, Government's Brief] which were enacted in the light of the *Hallock* decision contain the following provision:

> "Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate and remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless *that* estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate."

We submit that under the very language of the above quoted Regulation the life estates of the Stinson daughters must be excluded in applying the *Hallock* decision. The term "outstanding", when used in connection with estates or interests in property, has a generally accepted meaning. It refers to those estates and interests the title or ownership of which is outstanding. Clearly, therefore, the life estates of the daughters were "outstanding" at the time of the decedent's death.

According to the construction of the said Regulation urged by the Government, it would logically follow that even if Mrs. Stinson, prior to 1931, had made an absolute transfer of her life estate to someone else,

nevertheless, on her death the life estates owned by the daughters could not be excluded in determining the taxable interests in Mrs. Stinson's estate. Such a result, we submit, would be absurd.

The foregoing also applies to the case at bar. Here the decedent, in effect, carved out of his property an estate *pur autre vie*, measured by the lives of his two nieces. The interests in this estate *pur autre vie*, he transferred absolutely and irrevocably by the trust which he created on June 8, 1922. These interests, it is true, were subject to the preceding life interest which the decedent reserved to himself, but this, as we have seen, did not render their transfer taxable, since such transfer is governed by *May* v. *Heiner*. The situation however is different as regards the remainder interests. These were subject to the reversionary interest which the decedent had reserved, and thus the transfer thereof was taxable under the *Hallock* case.*

If it is thought desirable to change *May* v. *Heiner*, we respectfully submit that the only way such change

* Referring to extract from the opinion of the New York Appellate Division, Second Department, in *Matter of Pratt*, 262 App. Div. 240, aff'd. without opinion 289 N. Y. 621, quoted in the footnote on page 11 of the Government's brief, we respectfully submit the following: (1) Certainly the grantor's reversionary interest was not an "impediment" to the taking effect of the life interests which had precedence over it. The only "impediment" to the taking effect of such life interests was the life interest which the grantor had reserved to himself. The obliteration of this particular "impediment" did not result in a taxable transfer (*May* v. *Heiner*, *supra*). (2) The Court says that "the remainder which then vested for the first time is the fund to be taxed." If so, the value of the remainder should be ascertained by deducting the outstanding life estates, and yet the Court held that "the full value of the trust fund at the date of the decedent's death" without deducting the value of the outstanding life interests, should be included in the taxable estate.

could be accomplished in a fair and equitable manner would be by congressional action. If this Court should partially overrule *May* v. *Heiner* (which is what the Government's contention really involves), it would lead to gross inequalities of taxation and to patently unfair results. This is clearly illustrated by the following three hypothetical cases:

(1) Prior to 1931, A creates an irrevocable *inter vivos* trust reserving to himself the entire income for life with remainders over. The estate tax payable at his death on this transfer would be zero (*Hassett* v. *Welch, supra*).

(2) Prior to 1931, A creates an irrevocable trust giving successive life estates to half a dozen persons but providing that if he should survive all of them, the corpus of the trust should revert to him. Result: a minimum part of the trust is subjected to tax in view of the deduction of the outstanding life estates under the *Hallock* case. Let us say, therefore, that one-fifth of the property is subjected to tax.

(3) But according to the Government's contention, if A in Case (2) merely reserves a life interest (which reserved interest results in no tax whatever under Case (1)), such reservation under Case (2) results in subjecting to tax the entire trust fund as distinguished from the portion thereof which is subjected to tax under Case (2).

Thus the Government's contention may be reduced to the following formula: 1 5th plus 0 = 5 5ths. In practical operation such a formula is bound to result in gross inequalities of taxation and manifest unfairness. Since the interest reserved by the decedent

in Case (3) is an interest the reservation of which results in no tax (Case (1)), it is difficult to see why the property subjected to tax should be any different in Case (3) from Case (2).

Our *Duncan* case also serves to illustrate the unfair practical results to which the Government's contention would lead. Mr. Duncan had inherited from his wife one-half of her estate and shortly after her death he decided to place this property in an irrevocable trust under which the income would be payable to himself for life, and after his death to his only son for life, and after the death of both of them to his grandchildren until they, respectively, attained the age of thirty-five years when their respective shares of the principal would become distributable to them. Mr. Duncan was averse to having the property distributed outright to the grandchildren before they had attained a mature age. If his plan could have been carried out in the precise *form* that he contemplated, no Federal estate tax concededly would have been payable on his death. However, because he was a resident of the State of New York and under the New York "Rule against Perpetuities" (N. Y. Personal Prop. Law §11; Real Prop. Law §42) a trust may not be created to last for longer than two lives in being at the time of its creation, his dispositive plan had to take a different *form*. Accordingly, the lives of his son and grandson who were then, respectively, twenty-nine and three years of age, were selected as the "measuring lives" for the trust. Thus the decedent's plan was fitted into the framework of the New York "Rule against Perpetuities". This, however, did not change his underlying intention. Naturally, although it was most unlikely that the

decedent who was then over sixty-five years of age would survive both his son and grandson who were twenty-nine and three years of age, respectively, this, nevertheless, was within the range of possibility and, therefore, in order to protect the decedent's life interest, it was necessary that he reserve a reversionary interest in the corpus of the trust in the event that the trust should end before his death.

Looking at the matter from a practical standpoint, however, the difference between the two plans was primarily one of form rather than of substance. In actual results there has been no difference at all.

Of course, it is entirely reasonable in such a case to subject to tax the remainder interests which the decedent made subordinate to his reversionary interest. But there is an obvious incongruity in making the complete exemption or complete taxability of the *entire* trust depend upon a relatively unimportant provision which in the normal course of events would never become effective.

Respectfully submitted,

CHARLES ANGULO,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 578.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* Estate of Lester Field, Deceased, Barnett Hollander, Temporary Administrator and Executor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 5, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a companion case to *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, No. 263, decided this day. It too presents a question as to the proper valuation of the corpus of an *inter vivos* trust under Section 302(c) of the Revenue Act of 1926, 44 Stat. 9, 70.

On June 8, 1922, the decedent transferred to a trustee certain assets valued at the date of his death at the sum of $157,452.82. The material portions of the trust provided:

1. The trust was to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under 4, *infra*.

2. The income was to be paid to the decedent for his life unless the trust terminated before his death.

3. If the decedent died prior to the termination of the trust leaving issue, the trust property was to be held in trust for the children or their issue, subject to decedent's right to reduce or cancel the amounts of the gifts by will or written instrument. Provisions were also made for a $150,000 trust for the widow which is not in issue in this case.

4. During the continuance of the trusts the income was to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus was to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving; if none, then to decedent's brother or sister or their issue.

5. Upon termination of the trust before the death of the decedent the corpus was to be paid over to decedent.

6. Upon termination of the trust after the death of the decedent but during the existence of any trust the corpus was to be paid to the life beneficiary.

The decedent at no time had any issue. At his death in 1937 at the age of 52, he was survived by the two nieces whose lives were to measure the maximum life of the trust. These nieces were then aged 18 and 25 respectively. He was also survived by his widow, a sister and issue of a deceased brother.

The Tax Court held that the entire amount of $157,452.82 was includable in the gross estate for purposes of the estate tax. 2 T. C. 21. But the court below reversed and remanded the case to the Tax Court with directions to include in the gross estate only $24,930.76—the value at the time of decedent's death of a remainder in the sum of $157,452.82 payable at all events upon the death of the survivor of two females, aged 18 and 25 respectively. 144 F. 2d 62.

The error of the court below is self-evident from our discussion in the *Fidelity-Philadelphia Trust Co.* case. The trust here was limited in duration to the lives of the decedent's two nieces. But if both nieces died before the decedent, the corpus would have been paid to the decedent rather than to the beneficiaries named in the trust instrument (in this instance the decedent's sister and the issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.

There is no basis evident for deducting the value of the corpus for the period of the life expectancies of the two measuring lives, as was done by the court below. The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

Reversed.

Mr. Justice DOUGLAS, concurring.

If the trust gave a life estate to the decedent and the remainder to his children, § 302(c) of the 1926 Act would not require the payment of a tax under the rule of *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; and *Hassett* v. *Welch*, 303 U. S. 303. The theory of *May* v. *Heiner* was that under those circumstances no interest in the property passed from the grantor to the remainderman on the grantor's death, since the title of the remainderman had been definitely fixed by the trust deed. We need not determine whether the rule of *May* v. *Heiner* should survive *Helvering* v. *Hallock*, 309 U. S. 106. See Paul, Federal Estate & Gift Taxation (1942) § 7.15. For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces. Hence it seems plain that the gifts over would take effect in possession or enjoyment only at or after the death of the grantor.